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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 544

ARROW TRANSPORTATION COMPANY, ET AL., *Appellants*,

v.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, ET AL., *Appellees*.

No. 545

INTERSTATE COMMERCE COMMISSION, *Appellant*,

v.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, ET AL., *Appellees*.

On Appeal from the United States District Court for the Southern District of Ohio.

REPLY TO MOTIONS TO AFFIRM AND MEMORANDA

NUEL D. BELNAP
RICHARD M. FREEMAN
One North LaSalle Street
Chicago, Illinois

JOHN C. LOVETT
Lovett Building
Benton, Kentucky

BYRON M. GRAY
700 KPL Tower
Topeka, Kansas

DONALD MACLEAY
1625 K Street, N. W.
Washington, D. C.

A. ALVIS LAYNE
952 Pennsylvania Building
Washington, D. C.

CHARLES J. McCARTHY
ROBERT H. MARQUIS
Tennessee Valley Authority
Knoxville, Tennessee

Counsel for Appellants in No. 544

ROBERT W. GINNANE,
General Counsel,

I. K. HAY,
Deputy General Counsel,

BETTY JO CHRISTIAN,
Attorney,
Interstate Commerce Commission
Washington, D. C. 20423

Counsel for Appellant in No. 545

December 1964

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STATUTE:

Interstate Commerce Act, 49 U.S.C. 1, *et seq.*, as amended, 54 Stat. 922, 71 Stat. 411:	
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REPLY TO MOTIONS TO AFFIRM AND MEMORANDA

Drastically different positions are taken in the Motions to Affirm filed by the Southern Railway system (herein referred to as "Southern"), the Southern Governors' Conference, et al., and the City of Cincinnati, and in the Memorandum filed by the Solicitor

General. The Memorandum filed in behalf of the Secretary of Agriculture supports Southern's position.

Southern seeks to defend the judgment of the court below. The Solicitor General concedes that the court's judgment is indefensible and suggests summary reversal because of holdings which go beyond the proper scope of judicial review, but asks that the Court also find that the Commission's finding as to competition is inadequate and direct that the cause be remanded to the Commission for further proceedings. The Southern's Motion and the Solicitor General's Memorandum will be discussed herein in that order. The Secretary of Agriculture's Memorandum and the other motions to affirm make no additional points and require no reply.

I.

SOUTHERN'S MOTION TO AFFIRM

Southern's Motion to Affirm rests on basic errors of law and fact. It would obscure the important issues which should be resolved by this Court.

(1) The Section 3(1) Issue

The section 3(1) issue is "narrow and conventional", as contended by Southern, *only* if the law governing the scope of the Commission's discretion is changed, the Commission's cost findings are rewritten, and findings and evidence of competition faced by the Southern at Ohio and Mississippi River ports and at the Tennessee River ports are distorted.

Southern's major premise is that the Interstate Commerce Commission cannot find undue prejudice and preference in any situation where there is any difference in transportation conditions or competitive cir-

cumstances as between the preferred and prejudiced points. (M., pp. 13-14)[1] In support of its contention, Southern relies primarily on an 1892 decision, *Interstate Commerce Comm'n* v. *Baltimore & O. R.R.*, 145 U.S. 263, 284. More recent decisions are directly to the contrary. *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573, 588-594; *Barringer & Co.* v. *United States*, 319 U.S. 1, 6-7; *United States* v. *Wabash R.R.*, 321 U.S. 403, 410-11; *New York* v. *United States*, 331 U.S. 284; *United States* v. *Illinois Central R.R.*, 263 U.S. 515.[2]

There are differences in transportation conditions and competitive circumstances in virtually every section 3(1) case. It is the Commission's function to weigh

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[1] Citations to "M" are to the Motion to Affirm filed by Southern. Citations to "Com. J.S." are to the Jurisdictional Statement filed by the Interstate Commerce Commission. Citations to "Arrow J.S." are to the Jurisdictional Statement filed by Arrow Transportation Company, et al. Citations to "S.G." are to Memorandum filed by the Solicitor General.

[2] Southern itself cites *United States* v. *Illinois Cent. R.R.*, *supra*, and *New York* v. *United States*, *supra*, but holdings in these cases refute its position.

In *Illinois Central*, the Court held that a finding of unlawful preference and prejudice is not precluded "by showing that the preferential rate was given to others for the purpose of developing traffic on the carrier's own lines or of securing competitive traffic" (p. 525).

In *New York*, the Court held:

"The choice of groupings is plainly a specialized problem in transportation economics upon which the Commission is peculiarly competent to pass. Its judgment that the difference in consists between the territories do not justify the present differences in interterritoral class rates is, indeed, an expert judgment entitled to great weight. We could not disturb its findings on the facts of this record without invading the province reserved for the expert administrative body" (p. 326).

these factors in the light of the public interest and determine whether they are of sufficient magnitude to justify the discrimination. Here grain merchants at the Tennessee River ports have the same type of facilities as merchants at Ohio and Mississippi River points. Grain is loaded from elevators into the same type of cars for movement to the same destinations, covering part of the journey over the same tracks. There are minor transportation differences between movements from Chattanooga and Evansville; there are similar differences between movements from Evansville and St. Louis. These differences can only be a matter of degree. Acceptance of Southern's proposition that any difference in costs precludes the Commission from requiring equality of treatment would necessarily prevent the Commission from prescribing rates by origin or destination groupings without regard for strict cost considerations, and would require overruling *Ayrshire Collieries Corp.* v. *United States, supra.* It would reduce the role of the Commission to that of a computer with no opportunity to exercise an informed judgment.

Southern's minor premise is that the Commission made findings as to differences in transportation conditions at the prejudiced points on the Tennessee River and the preferred points on the Ohio and Mississippi Rivers which preclude a finding of unlawful preference and prejudice. (M., p. 13). It says that the "most notable" such finding was that the effect of non-discriminatory rates from the Tennessee River ports "would be *drastically* to decrease the average annual utilization of Southern's Big John cars." [emphasis supplied] This is not the finding which the

Commission made. The Commission's finding was that:

> We agree with the Southern that the "Big John" car utilization would be reduced to the extent that such cars were used to haul grain from the Tennessee River ports. We do not agree, however, that a virtual embargo may be imposed on traffic moving from the Tennessee River ports to major markets in order to justify costwise the rates established from the Mississippi and Ohio River crossings. (Arrow J.S., p. 42a)

There is a striking parallel between the Commission's finding here and this Court's holding in *Ayrshire Collieries Corp.* v. *United States, supra*:

> Yet all that appellants attempt here is to show that discrepancies in rates are not warranted by any difference in transportation conditions or in distance. That is not enough provided the Commission was justified in considering the element of competition.
>
> We think it was. (p. 592)

Furthermore, as the Commission recognized (Arrow J.S., p. 43a), the section 3(1) issue in this case arises in the context of intermodal competition between all-rail movements from the Ohio and Mississippi crossings and barge-rail movements via the Tennessee River ports. In such a situation, even assuming acceptance of Southern's contention that cost differences require the Commission to approve rate differences, the rate differences applicable to the ex-barge traffic would have to be related to proved differences in cost (*Interstate*

Commerce Comm'n v. *Mechling*, 330 U.S. 567, 581).[3] Here the only element of relative cost (and of necessity the only element discussed by the Commission) was the effect of car utilization. And even on this narrow point, such evidence consisted only of general opinion testimony that car utilization from the Tennessee River ports would be less. It offered no basis for measuring any cost differences which might result. A determination as to relative costs from the Tennessee River ports and from the Ohio and Mississippi River crossings would require a detailed study covering not only this factor but many others. Southern presented no such study.[4]

Southern also attacks as not supported by substantial evidence the Commission's finding that there is not sufficient dissimilarity in transportation conditions to justify the discrimination against the prejudiced points because "Severe truck competition exists at the Tennessee River ports as well as at the

[3] Southern states that its rates were "meticulously designed" to meet long-haul truck competition. (M., p. 9) In fact:

(a) Southern's reply to the petition for suspension stated that the competition the rates were designed to meet was primarily water transportation (Arrow J.S., p. 115a). The contention that unregulated trucks represent the major competition was developed *after* the rates had been designed.

(b) Southern's vice president King, in charge of Southern's Traffic Department, testified that he did not know how low he had to go in order to get the business, and did not know whether the rates were lower than necessary to meet the competition (Tr. 291). The Commission found that Southern failed to show "that a lesser reduction would not accomplish its declared purpose" (Arrow J.S., p. 39a).

[4] The burden of proving cost differences was on Southern, as the proponent of the changed rates. (49 U.S.C. § 15(7)).

Ohio and Mississippi River crossings" (M., pp. 14-15). This subject is adequately covered in the jurisdictional statements. (Com. J.S., pp. 12-18; Arrow J.S., pp. 9-15).[5]

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[5] Footnote 11, at page 17 of Southern's Motion, does present three new contentions:

1. That appellants have changed their position. This is not correct. The same positions were taken in the Court below.

2. That the long-haul truck competition experienced at both the Ohio and Mississippi River crossings and the Tennessee River ports is not transportation competition but "rather competition in the satisfaction of consumer demand, unrelated to the method of transportation involved", citing an 1896 decision having something less than clear relevance to the point involved. The competition from the long-haul trucker is *transportation* competition to Southern at both the Ohio and Mississippi River crossings and at the Tennessee River ports. As the Interstate Commerce Commission recognized more than 50 years ago: "Strictly speaking, there is no such thing as market competition which is distinct from competition between the lines of transportation serving the market. A market can only compete through the agency which transports for it. The carrier makes a rate from a given market, not out of favor to that locality, but because it desires to obtain traffic which will not otherwise come to it. There would seem, therefore, to be little distinction between the competition of markets and the competition of rival railroads." *City of Spokane* v. *Northern Pacific Ry.*, 21 I.C.C. 409, 414 (1911), *aff'd*, *United States* v. *Atchison, Topeka & Santa Fe Ry.*, 234 U.S. 476 (1914).

3. That the Commission's finding is "inconsistent with the testimony . . . of the barge lines serving the Tennessee River points that they had never felt the impact of any long back-haul truck competition." This is a classic among non-sequiturs. The extent of long back-haul truck competition into the Southeast was hotly disputed before the Commission. Southern persuaded the Commission that it was of large proportions, and on that basis the Commission applied an out-of-pocket rather than a fully distributed cost to determine that the all-rail routes rather than the barge-rail routes were the low-cost mode. Southern, having prevailed on this point, now seeks to disavow its own evidence in favor of that offered by the barge lines to escape those consequences of the Commission's acceptance of its portrayal of the competitive situation which it happens not to like.

In essence, Southern's argument is that it is entitled to elect to meet at the Ohio and Mississippi River crossings the long-haul truck competition of which it complains, while refusing to meet at the Tennessee River ports either that same long-haul competition or the additional short-haul competition, even though the result of such refusal is to put grain merchants at the Tennessee River ports out of business. If this position is accepted, railroads will be given the power of life and death over businesses which afford them shorter hauls than competing businesses elsewhere on their lines. Certainly so fateful a proposition is deserving of consideration by this Court prior to its formal promulgation.

Finally, it should be noted that Southern's Motion misconstrues the Commission's opinion and order. The Commission did not rule, as Southern states, "that any disparity of per mile rate treatment by Southern as between short and long hauls would be unduly prejudicial and preferential" (M., pp. 12-13).[6] What the Commission held was that "The respondents may employ any means of correction they choose, provided that rail rates from the Tennessee River ports are no less favorable to shippers located thereat than the all-

[6] Southern's assumption that elimination of the 240 cent minimum would produce equality "per mile" is erroneous. The rates in issue are computed on a formula which includes both a terminal and a ton-mile factor. Because the terminal factor is spread over all the miles traveled, the per mile rate on a shorter haul is always higher than on a longer one. For example, a haul of 400 miles produces a rate of 271 cents per ton [42 + (400 × .573)], or .68 cents per ton mile (61 cents per 90-ton car mile). By contrast, a haul of only 100 miles produces a rate of 99 cents per ton [42 + (100 × .573)], or .99 cents per ton mile (89 cents per 90-ton car mile). Thus, the shorter haul, with the minimum rate eliminated, would produce ton-mile or car-mile earnings approximately 45 per cent greater than would the longer haul.

rail rates available to shippers at the Ohio and Mississippi River crossings who compete in common markets in the Southeast" (Arrow J.S., p. 44a).

(2) The Section 1(5) Issue

The section 1(5) issue is "narrow and conventional", as contended by Southern, only if this Court is prepared to accept the District Court's determination of the weight to be given Southern's cost evidence, and thus permit the courts to invade what heretofore has been regarded as the province of the administrative body. *Illinois Commerce Comm'n* v. *United States*, 292 U.S. 474, 481.

Southern sought to carry its burden of proof as to reasonableness of the rates by showing its average costs. An essential part of showing its costs was establishing a reliable figure for car utilization. Southern used a figure of 40,000 miles per year, far in excess of any established figure. Division 2 while rejecting some of Southern's costing factors, accepted the 40,000 mile figure on the basis of operating and engineering judgments, but pointed out that "no significant or dependable experience has been gained either as to future car utilization or the car expenses that might be associated with such utilization" (Arrow J.S., p. 137a).

The entire Commission accepted the finding that there was no reliable data in the record as to car utilization but did not accept the operating and engineering judgments. It also pointed out that the car utilization figure used by Division 2 should be reduced because the curing of the section 3(1) discrimination and the approval of the rates of the other railroads would each result in reduced car utilization. A determination as to the reliability of the data submitted by Southern is certainly a matter peculiarly

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within the competence of the Commission, and a finding by the Commission that the 40,000 mile figure had not been justified, with the result that a proper return had not been established, was all that was required to sustain the Commission's order cancelling the proposed rates.

It was in this context that the District Court accepted Southern's argument and found, as a fact, that "Southern entered an exhibit which indicated that their actual experience with the use of 'Big John' cars under multiple car rates had been a utilization figure of 60,212" (Arrow J.S., p. 11a). "Actual experience" did not, in fact, so indicate (Arrow J.S., p. 17),[7] and Division 2, which was prepared to accept Southern's general opinion testimony, expressly found that there was no "dependable experience". (*supra*, p. 9)

One could hardly find a better example of error which can come about when a court "goes beyond the proper scope of judicial supervision of administrative agencies" (S.G., p. 8).

(3) The Section 15a(3) Issue

Southern makes no real effort to defend the District Court's ruling on the section 15a(3) issue, but suggests that if the remainder of the District Court's ruling is correct, the section 15a(3) issue is academic (M., p. 23).

If the District Court's ruling on this issue is incorrect, as we think is clearly the case, to permit it to remain in the books backed by the imprimatur of an

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[7] In its Motion, Southern points to the importance of "turn-around time" in utilization of equipment. (M., p. 13, fn. 8) Yet it was the "turn-around time" at origin that Southern had failed to measure in its "experience" study. (Arrow J.S., p. 17)

affirmance of the District Court's decision by this Court could give rise only to misunderstanding and additional unnecessary litigation. But it cannot be academic since the Commission expressly found (Arrow J.S., pp. 39a-40a) that on certain port-to-port movements the barge routes have the inherent advantage of lower cost even on an out-of-pocket cost basis. The Commission found it unnecessary to deal with this problem because rail rates at the level it was willing to approve were higher than the corresponding barge rates. Southern's rates, as approved by the District Court, raise the problem directly because they undercut the barge rates on movements where the barge lines, without question, have the inherent cost advantage.

II.

MEMORANDUM OF THE SOLICITOR GENERAL

(1) The Section 3(1) Issue

The Memorandum of the Solicitor General attacks as erroneous the Commission's finding that:

> "No defense is available to the Southern here by reason of any substantial dissimilarity in transportation conditions as between the origins preferred and those prejudiced. Severe truck competition exists at the Tennessee River ports as well as at the Ohio and Mississippi River crossings."

In attacking this subsidiary finding, the Memorandum displays an unawareness of facts that are undisputed. It states (S.G., p. 6) that the Commission, in speaking of severe truck competition which exists at the Tennessee River ports as well as at the Ohio and Mississippi River crossings, "plainly refers to competition '*at*' those points, i.e., motor carriers offering

alternatives for shippers located there, as distinguished from carriers traversing a route touching neither point." In the second sentence immediately following, the Memorandum further states that in speaking of the inability of the carrier to pick and choose the competition it will meet, "the Commission was describing that competition afforded by the different truck movements *which originate at the preferred points on the one hand and at the prejudiced points on the other*". (emphasis supplied)

The Memorandum thus labors under the apparent misapprehension that there are substantial long-haul truck movements of grain which *originate at* the Ohio and the Mississippi River crossings. This is not the case. Southern itself represented, and it is undisputed, that the long-distance unregulated backhaul truck movements to the Southeast originate at country elevators north and west of the Ohio and Mississippi River crossings. Such movements do not originate at the crossings themselves. These truck movements, originating back of the crossings, proceed through or around both the Ohio and the Mississippi River crossings and the Tennessee River ports, furnishing competition for merchants at both sets of locations. There is additional truck competition—some of it backhaul—*from* the Tennessee River ports.

The arguments set forth in the Memorandum are thus predicated upon assumptions as to the transportation situation which simply do not fit the facts.

(2) The Section 1(5) Issue

The Solicitor General's Memorandum ignores the District Court's invasion of areas assigned by the

Congress to the Commission with respect to the section 1(5) issue. There, as in the case of the section 3(1) issue, the District Court also made findings of fact as noted, *supra*, p. . This erroneous invasion of the province of the Commission led the District Court to make erroneous factual statements, and raises substantial questions requiring plenary consideration.[8]

(3) The Section 15a(3) Issue

The Solicitor General's Memorandum fails to comment on the substantial questions raised by the District Court's disposition of the section 15a(3) issue.[9]

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[8] In its discussion of the section 1(5) issue the Memorandum states that the Commission "cited two other factors as adversely affecting utilization of the new cars" (S.G., p. 5). In fact, as the District Court noted, the Commission cited three other factors. Furthermore, we do not understand what is meant by the statement in the Memorandum that the three factors were cumulative. Certainly the factor which the Memorandum fails to mention, "That there was no reliable evidence of record to support the claimed utilization figure of 40,000 * * *" (Arrow J.S., p. 11a) is sufficient standing alone to support the Commission's order.

[9] Another point which the Solicitor General's Memorandum ignores is that the rates in issue are in effect over the other railroad systems serving the Southeast in addition to Southern. Division 2 found that the rates over these other roads could not be justified and would have authorized the existing rates for Southern alone. The entire Commission held that, in fairness to shippers, rates over all the roads must be the same and could be on the somewhat higher level it was willing to approve. Thus, Division 2 and the entire Commission were in agreement that the existing rates could not possibly be justified for the railroads other than Southern, and the District Court made no attempt to justify them. These other roads have not even joined with Southern in seeking affirmance of the judgment below. Yet the Solicitor General suggests that the matter be reopened for probably lengthy proceedings before the Commission with rates meanwhile left in effect which, for the other railroads involved, have no possible basis for justification.

* * *

Appellants concur in the conclusion of the Solicitor General that the District Court erred, and that "substantial questions are presented" (S.G., p. 8), but submit that his proposed disposition of those substantial questions by summary reversal in part is no solution. The questions presented in this case are much too important and complex to be disposed of without plenary consideration.

Respectfully submitted,

DONALD MACLEAY
1625 K Street, N. W.
Washington, D. C.
Counsel for Arrow Transportation Company, American Commercial Lines, Inc., Blaske, Inc., Coyle Lines, Incorporated, Dixie Carriers, Inc., Federal Barge Lines, Inc., Gulf-Canal Lines, Inc., Igert, A. L. Mechling Barge Lines, Inc., Mississippi Valley Barge Line Company, The Ohio River Company, Sioux City and New Orleans Barge Lines, Inc., Union Barge Line Corporation, Waterways Freight Bureau

A. ALVIS LAYNE
952 Pennsylvani Building
Washington, D. C.
Counsel for The American Waterways Operators, Inc.

CHARLES J. MCCARTHY
ROBERT H. MARQUIS
Tennessee Valley Authority
Knoxville, Tennessee
Counsel for Tennessee Valley Authority

NUEL D. BELNAP
RICHARD M. FREEMAN
One North LaSalle Street
Chicago, Illinois
Counsel for Central Soya Company, Inc., Morris Grain Corporation, Cargill, Incorporated, Archer-Daniels-Midland Company

JOHN C. LOVETT
Lovett Building
Benton, Kentucky
Counsel for City of Guntersville, Alabama, Guntersville Chamber of Commerce, O. J. Walls, d/b/a O. J. Walls Company, John D. Bagwell Farms and Hatchery, Inc., Southeastern Association of Local Grain Producers, Processors, Merchandizers and Consumers, Tennessee River and Tributaries Association

BYRON M. GRAY
700 KPL Tower
Topeka, Kansas
Counsel for State Corporation Commission of the State of Kansas

Counsel for Appellants in No. 54,

ROBERT W. GINNANE,
General Counsel,

I. K. HAY,
Deputy General Counsel,

BETTY JO CHRISTIAN,
Attorney,
Interstate Commerce Commission
Washington, D. C. 20423

Counsel for Appellant in No. 545

December 1964